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No. 83-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE ENSIGN-BICKFORD COMPANY,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
and
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE INSTITUTE OF MAKERS OF EXPLOSIVES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Institute of Makers of Explosives (IME) supports the position of the petitioner in this case. IME is the safety association of the commercial explosives industry in the United States. It is a non-profit, incorporated association founded in 1913 to provide technically accurate information and recommendations concerning commercial explosive materials and their use.

The primary concern of the IME is safety in the manufacture, transportation, storage, handling and use of explosive

materials in blasting and other essential operations. The member companies of IME produce over seventy-five percent of the commercial explosives consumed annually in the United States. The Ensign-Bickford Company, petitioner, is a member of IME.

The member companies of the IME own and operate explosives manufacturing facilities located throughout the United States. All the IME member companies are subject to the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 653-678, at issue in this case. The expansive definition of a willful violation of the Act's general duty clause adopted below would affect all IME members. The absence of any specific guidelines or prohibitions in the Act's general duty clause forces employers to guess what conduct or what omissions might fall within its ambit. Coupling this vague statutory command with the expansive definition of willfulness adopted below would impose an undue burden on IME's members. They either would face the risk of prosecution for violations of an uncertain requirement, or would be forced to follow procedures and incur substantial costs that may not be required by the Act's murky mandate.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia Circuit below applied an improper standard for interpreting the meaning of a "willful" violation of the Act. The standard adopted below conflicts with the standard for determining willful violations of the Act previously adopted by the Court of Appeals for the Third Circuit. It also conflicts with the standard of willfulness applied by this Court to construe the meaning of a willful violation of the Cruelty to Animals Act in *United States v. Illinois Central Railroad Co.*, 303 U.S. 239 (1938). The court below expanded the *Illinois Central* definition of willfulness when the context of this case requires a more restrictive definition. Unlike *Illinois Central,* which involved a very specific statutory duty, the statutory duty at issue in this case is nonspecific. In further contrast to *Illinois Central,* wherein this Court construed a statute providing only civil penalties, willful

violations of the Act at issue here subject employers to the possibility of both criminal and civil sanctions.

Congress did not intend the Act to require employers to guarantee employees' safety. Because the ruling below represents a major step towards making employers such guarantors, it contravenes the clear policy intention of Congress.

ARGUMENT

I. The Standard Applied by the Court Below to Interpret the Meaning of a "Willful" Violation of the Act's General Duty Clause Conflicts with the Standard Adopted by the Third Circuit and Inappropriately Expands a Standard Previously Adopted by this Court.

The decision below defined a willful violation of the Act to be:

> an act done voluntarily with either an international disregard of, or plain indifference to, the Act's requirements.

717 F.2d 1419, 1422 (D.C. Cir. 1983) (quoting *Cedar Construction v. OSHRC,* 587 587 F.2d 1303, 1305 (D.C. Cir. 1978)). In addition to two of its own prior decisions, the Court of Appeals cited decisions of several other Courts of Appeal (*National Steel & Shipbuilding Co. v. OSHRC,* 607 F.2d 311, 313-316 (9th Cir. 1979); *Georgia Electric Co. v. Marshall,* 595 F.2d 309, 317-19 (5th Cir. 1979); *Kent Nowlin Construction Co. v. OSHRC,* 593 F.2d 368, 372 (10th Cir. 1979); *Empire-Detroit Steel v. OSHRC,* 579 F.2d 378, 384-85 (6th Cir. 1978); *Intercounty Construction Co. v. OSHRC,* 522 F.2d 777, 779-81 (4th Cir. 1975), *cert. denied,* 423 U.S. 1072, (1976); *F.X. Messina Construction Corp. v. OSHRC,* 505 F.2d 701, 701 (1st Cir. 1974)) and asserted that the courts have "unanimously" applied the same "plain indifference" standard it adopted. 717 F.2d at 1422. The D.C. Circuit's characterization, however, does not recognize the significantly different standard announced by the Court of Appeals for the Third Circuit in its *en banc* decision in *Frank Irey, Jr., Inc. v. OSHRC,* 519 F.2d 1200 (3rd Cir. 1975); *aff'd on other grounds,* 430 U.S. 442 (1977).

In *Irey* the Third Circuit carefully scrutinized the Act's three-tiered violation structure. It noted that a "willful" violation obviously was intended to be of greater significance than a "serious" violation because of the ten-fold greater penalty attached to the former:

> It is obvious from the size of the penalty which can be imposed for a "willful" infraction—ten times that of a "serious" one—that Congress meant to deal with a more flagrant type of conduct than that of a "serious" violation. Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act.
>
> Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply.

519 F.2d at 1207.

After recognizing that the "meaning of willfulness changes with the context in which it appears," the Third Court explained why the statutory language compelled its construction of willfulness:

> We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a "serious" offense and a "willful" one. The lack of demarcation would permit the agency to assess a higher penalty than that which is authorized for conduct defined as a "serious" violation. A broad interpretation of "willful" would disrupt the gradations of penalties and violations so carefully provided in the Act.

519 F.2d at 1207.

Rather than adopt the Third Circuit's standard, which preserves the carefully crafted gradations of violation provided in the statute, the Court below instead applied the plain indifference standard. The origin of the plain indifference standard can be traced back to this Court's decision in *United States v. Illinois Central Railroad Co.*, 303 U.S. 239 (1938).

In *Illinois Central,* this Court was required to interpret the meaning of the term "willful" as used in section 3 of the Cruelty to Animals Act. 45 U.S.C. §§ 71-74. The Cruelty to Animals Act required railroads to refrain from confining cattle for more than twenty-eight consecutive hours (thirty-six hours upon written request) without unloading them for rest, food and water. It also provided a civil penalty of $100 to $500 for "any railroad . . . who knowingly and willfully fails to comply."

In interpreting the Cruelty to Animals Act requirement that a violation be "willful," this Court noted that "mere omission with knowledge of the facts is not enough." 303 U.S. 239 at 242. It further remarked that the term is used to characterize "conduct marked by careless disregard whether or not one has the right so to act." (citing *United States v. Murdock,* 290 U.S. 389 (1933)). *Id.* This Court then quoted approvingly a definition applied by the Court of Appeals for the Eighth Circuit in *St. Louis & S.F.R. Co. v. United States,* 169 F. 69 (8th Cir. 1909) that willful

> means purposely or obstinately and is designed to describe the attitude of a carrier who having a free will or choice either intentionally disregards the statute or is plainly indifferent to its requirements.

303 U.S. at 243.

Although the standard adopted by the court below is derived from this Court's *Illinois Central* definition, by omitting the "purposely and obstinately" language, the D.C. Circuit has ignored the heart of this Court's definition and focused on the ancillary characterization of the "attitude" of the defendant. The Third Circuit definition of willfulness, by contrast, adheres more closely to the definition of willfulness adopted by this Court. The Third Circuit definition retains the element of obstinate defiance of the Act's requirements. This element is lacking from the broad definition adopted by the D.C. Circuit. Moreover, as demonstrated *infra,* there are significant reasons why a more restrictive definition of willfulness is appropriate for interpretations of that term under the Act as compared to the Cruelty to Animals Act.

II. The Expansive Standard Applied Below Is Inappropriate for Interpreting Willful Violations of the Act.

A. The Third Circuit Standard Furthers the Clear Intent of the Statute.

The Act contains a carefully drawn, specific set of penalty provisions. The degree of culpability for violations of the Act is carefully circumscribed by the multiple level of penalties. The penalties range from a fine of less than $1,000 for the least culpable violations, to one year imprisonment plus a $20,000 fine for the most egregious violations. Disparate as these penalties are, they become many-fold more disparate when multiple violations occur. The fact that Congress provided such a finely-tuned penalty structure for the Act strongly suggests that Congress wanted to ensure a close correlation between the degree of culpability of employer conduct and the penalty imposed to deter such conduct. Congress painstakingly tailored the punishment to fit the offense.

Unlike the definition of the D.C. Circuit, the Third Circuit definition of willfulness was designed to accommodate the systematic penalty gradations Congress built into the Act. The Act contains eight separate penalty provisions. 29 U.S.C. § 666(a)-(h). Three degrees of culpability are provided in these provisions: willful, serious and not serious.

Of these three, only a serious violation is defined in the Act:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. § 666(j). A "serious" violation carries a mandatory civil penalty of up to $1,000. A "not serious" violation carries a non-mandatory penalty of up to $1,000. The penalty for a "willful" violation, however, takes a quantum jump of up to $10,000 or, if certain aggravating factors are present, up to $20,000 coupled with imprisonment for as long as one year.

Because Congress only defined a serious violation, it must be assumed that conduct that does not rise to the level of creating a "serious" violation is "not serious." Similarly, to be "willful," conduct must rise to a level of culpability exceeding that defined in the Act as "serious."

The definition of a serious violation does not extend to situations where the employer "did not and could not with the exercise of reasonable diligence, know of the presence of the violation." Thus, to establish a serious violation, the employer must have knowledge of the violation or must lack such knowledge only because he failed to exercise due diligence. If neither of these conditions is met, the offense will not rise to the level of a "serious" violation and will necessarily be "not serious," if a violation at all. It is inescapable that a more egregious "willful" violation must at a minimum meet all the requirements of a serious violation and additionally encompass conduct that exceeds that level of culpability.

The D.C. Circuit definition of willfulness is flawed because it blurs the distinction between "willful" and "serious." Its standard—reckless disregard or plain indifference—is essentially the same as finding that an employer knew or should have known that a substantial probability of death or serious harm could result from its conduct. Both standards describe serious violations.

More than "plain indifference" is required to subject an employer to the possible twenty-fold greater fine as well as imprisonment that could be imposed for a "willful" violation. Plain indifference suggests no more than the employer knew or should have known of the violation and took no corrective action—nearly the exact equivalent of a serious violation. The Third Circuit's definition is therefore more in concert with the statutory scheme. It requires "defiance or such reckless disregard of consequences is to be a knowing, conscious, and deliberate flaunting of the Act." 519 F.2d at 1207. It means "more than merely voluntary action or omission—it involves an

element of obstinate refusal to comply." *Id.* The clear language of the statute requires this Court to adapt the definition of the Third Circuit, or its substantial equivalent.

B. The Non-Specific Requirements of the Act's General Duty Clause Make a Narrow Construction of the Term "Willful" Necessary.

The general duty clause of the Act requires employers to:

> furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

29 U.S.C. § 654(a)(1).

The broad sweep of this clause makes compliance in many instances difficult in the extreme. What is "recognized" by one employer may not be "recognized" by another. What is "likely" to cause death or serious physical harm undoubtedly will vary widely depending upon the context, the judgment of the assessor, and when the assessment is made.

The lack of notice of what conduct is prohibited or required by the general duty clause was a major concern of the Congress when it formulated that provision. The Senate version of the proposed legislation intentionally excluded the general duty clause from the penalty provisions because of this concern. 116 Cong. Rec. 37,326 (1970). The Senate Report reflects the concern the Senate Committee on Labor and Public Welfare held for the broad reach of the general duty clause:

> [T]he clause merely requires an employer to correct recognized hazards after they have been discovered on inspection and made the subject of an abatement order. There is no penalty for violation of the general duty clause. It is only if the employer refuses to correct the unsafe condition after it has been called to his attention and made the subject of an abatement order that a penalty can be imposed.

S. Rep. No. 1282, 91st Cong., 2d Sess. 41, *reprinted in* 1970 U.S. Code Cong. & Ad. News 5177, 5186. Upon introducing

the bill in the Senate, Senator Williams, the bill's floor manager, expressly stated that the Committee was concerned that "the general duty clause might impose too vague and sweeping a duty on employers." 116 Cong. Rec. 37,326 (1970). This concern was also voiced in the House consideration of its version of the bill. *See, e.g.,* 116 Cong. Rec. 38,369, 38,371, 38,372, 38,378 (1970).

Although the Conference Committee version of the bill did subject the general duty clause to the Act's penalty provisions, the Congressional concern over its wide scope should be reflected in judicial construction of the Act. Indeed, courts have expressed concern over inadequate notice provided by relatively specific regulations promulgated under the Act. The general duty clause suffers from the same infirmity the Courts of Appeal for the Fifth and Tenth Circuits recognized in the contexts of these more specific regulations: it fails to give employers fair warning of the conduct it prohibits. *Usery v. Kennecott Copper Corp.,* 577 F.2d 1113 (10th Cir. 1977); *Diamond Roofing v. OSHRC,* 528 F.2d 645 (5th Cir. 1976); *Kent Nowlin Construction Co. v. OSHRC,* 593 F.2d 368 (10th Cir. 1979). The warnings of these decisions become clothed with even greater significance in the context of the general duty clause, which by its nature forces employers to guess, at least to some extent, how the Secretary of Labor will interpret the clause. As the court in *Diamond Roofing* emphasized:

> An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

528 F.2d at 649.

Because of the inadequate notice inherent in the general duty clause, the standard for determining a willful violation of

it should give the benefit of doubt to the employer. "It was not the purpose of the Act to make an employer the insurer of his employees's safety." *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977) (citing *Dunlap v. Rockwell International*, 540 F.2d 1283 (6th Cir. 1976) and *Brennan v. OSHRC*, 511 F.2d 1139 (9th Cir. 1975)).

In contrast to the non-specific general duty clause, the statutory provision under consideration in *Illinois Central* was definite and specific: cattle must not be confined in a rail car for more than twenty-eight continuous hours. In *Illinois Central*, inadequate notice of what the statute required was of little concern. Any departure from this court's definition of "willful" adopted in *Illinois Central*, therefore, should be movement towards a narrower definition rather than the opposite tack taken below. The expansive standard adopted in the decision below is inappropriate for violations of the Act generally, and particularly so for general duty clause violations.

C. The Availability of Criminal Sanctions Under the Act Requires A Narrow Definition of Willfulness.

Both civil and criminal sanctions can flow from willful violations of the Act. 29 U.S.C. § 666. Although no criminal penalty can be assessed for violation of the general duty clause, criminal sanctions are permitted for certain willful violations of the Act. Unless this Court is willing to tolerate two different meanings for the same word within the confines of the same statute, the term must be construed the same under all the Act's penalty provisions. Thus the definition must be appropriate for both civil and criminal violations. The need for a more restrictive definition of willfulness in criminal as distinct from civil contexts has been consistently recognized by this Court. *See, e.g., U.S. v. Bishop*, 412 U.S. 346 (1973); *U.S. v. Murdock*, 290 U.S. 389 (1933); *U.S. v. Pomponio*, 429 U.S. 10 (1976). The availability of criminal sanctions for willful violations of the Act makes the need for a narrow construction of the term "willfully," as used in the Act, compelling.

III. Permitting the Decision Below to Stand Would Impose Unnecessary Costs on the Nation's Employers.

Allowing the decision below to serve as the guideline for employers to meet in complying with the Act will have widespread consequences for the nation's employers. It is likely to impose on employers additional compliance costs that go beyond what the language of the Act requires. The additional compliance costs will be particularly acute with respect to the general duty clause because of uncertainty over what that provision requires.

The general duty clause requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." It is impossible for any reasonable employer to determine in advance all recognized hazards likely to cause death or injury that a court may someday find to exist. Employers, therefore, will be forced to overprotect their facilities to provide a margin of error, or take the risk of incurring substantial fines.

IME certainly does not advocate lax safety measures, or maintain that safety should be a secondary concern. On the contrary, advancement of adequate safety requirements is the essential purpose served by IME and the main reason for its existence. IME does urge this Court, however, not to condone unnecessary safety measures and costs.

CONCLUSION

The decision below should be reversed. The standard of willfulness applied below is improper for use in the context of the Act. The more restrictive definition of willfulness of the Third Circuit should be made the law of the land. That narrower definition (a) is more consistent with the three-tiered violation structure of the Act (b) is more appropriate given the inadequate notice provided by the nonspecific, general duty clause of the Act and (c) provides a necessary safeguard in view of the criminal penalties provided for violations of the Act.

The definition adopted by the court below would place an unnecessary burden on employers. That definition should be rejected by this Court in favor of the narrower definition of the Third Circuit.

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